82-766

No.

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. Is a percentage limitation only on the fundraising costs of charities facially unconstitutional *per se* under the First Amendment no matter how moderate, flexible or reasonably applied?

2. Does State law imposing a criminal penalty or authorizing withdrawal of registration from a charity spending more than 25% on fundraising costs constitute a "prior restraint" on that charity when compliance with percentage limitation is not a condition precedent for registration and a charity may be exempted from the percentage limitation requirement, even after that limitation has been exceeded?

3. May a professional fundraiser to whom a percentage limitation on fundraising fees may be validly applied challenge that limitation on its face with respect to others in the absence of prior restraint or a showing of real and substantial First Amendment overbreadth?

PARTIES

The parties to the proceedings in the Court of Appeals of Maryland were the Joseph H. Munson Company, Inc. and the Secretary of State of Marvland, at that time Fred L. Wineland. Mr. Wineland resigned on July 1, 1982 and was subsequently replaced by Patricia G. Holtz.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

The Secretary of State of Maryland, Patricia G. Holtz, prays that a writ of certiorari issue to review the judgment entered in this case on August 5, 1982 by the Court of Appeals of Maryland.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported as Joseph H. Munson Co., Inc. v. Secretary of State, ___ Md. ___, 448

A.2d 935 (1982) and is reprinted in the appendix to this petition (App. 1a). The opinion and judgment of the Court of Special Appeals of Maryland reversed by the State's highest court is reported as Joseph H. Munson Co., Inc. v. Secretary of State, 48 Md.App. 273, 426 A.2d 985 (1981), and is also reprinted in the appendix (App. 23a). The opinion and order of the Circuit Court for Anne Arundel County that occasioned an appeal is unreported, but is reprinted in the appendix (App. 38a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1982. The jurisdiction of this Court rests on 28 U.S.C. §1257(3) and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State small make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Annotated Code of Maryland

Article 41, §103D:

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretrary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the

charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations.

Code of Maryland Regulations

COMAR 01.02.04.05:

A. Calculating Fund-raising Expenses. If an organization confines its solicitation to one or more clearly delineated campaign periods, the 25-percent limitation contained in Article 41, §103D(a), Annotated Code of Maryland, may be applied retrospectively on an annual basis or on a campaign-by-campaign basis. Under no circumstances, however, may an organization enter into an agreement to pay as expenses in connection with a fund-raising activity a total amount in excess of 25-percent of the total gross income raised or received by reason of the fund-raising activity, except as set forth in Article 41, §103D(a) and (b), Annotated Code of Maryland, and this regulation.

B. Exceeding the 25-percent Limitation.

(1) The Secretary may permit an organization to exceed the 25-percent limitation contained in Article 41, §103D(a), Annotated Code of Maryland, upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative.

(2) Instances in which the 25-percent limitation would effectively prevent an organization from raising contributions, include, but are not limited to, the following situations:

(a) When there are extraordinary, unusual, and non-recurring circumstances which

can be factually supported; and

(b) When an organization is less than 2 fiscal years old and in the developmental state.

(3) An organization which expects to exceed or does exceed the 25-percent limitation shall file a request for a waiver with the Secretary on forms provided by him before further engaging in solicitation. The organization shall provide the Secretary with the percentage amount by which it expects to exceed or has exceeded the 25-percent limitation.

(4) If the Secretary denies a request for a waiver of the 25-percent limitation, the organization adversely affected may request a hearing pursuant to COMAR 01.02.03.

C. Disclosure of Waiver of 25-percent Limitation.

(1) As used in this regulation, the terms "gross income" and "fund-raising expenses" are limited as set forth in Article 41, §103D(a) and (b), Annotated Code of Maryland.

(2) When the Secretary, pursuant to Article 41, §103D(a), Annotated Code of Maryland, and this regulation, grants a waiver to an organization which expects to exceed the 25-

percent limitation, the organization shall disclose to the public the percentage amount authorized bythe Secretary to be used for fund-raising expenses. The organization shall print or affix this disclosure by stamp or label on each item of the goods to be sold or publications to be distributed in letters of eight-point type or larger as follows: "The percentage of gross income raised as a result of this solicitation which may be used for fund-raising expenses may not exceed ____ percent. The Maryland Secretary of State has authorized a waiver of the statutory 25-percent limitation on fund-raising expenses."

(3) When it is not feasible to print or affix this information on each item of goods to be sold, a sign disclosing the information in the form prescribed above shall be printed in block letters at least 1 inch high and conspicuously displayed at each location where the sale of goods occurs.

(4) In the case of telephone solicitation, oral communication, or media solicitation, an organization which:

(a) Expects to exceed the 25-percent limitation shall disclose in each case of solicitation the information prescribed by §C(2) above; or

(b) Does exceed the 25-percent limitation shall disclose in each case of solicitation the information prescribed in §C(5), below.

(5) An organization which exceeds the 25-percent limitation shall include for the next year in all solicitation mailings, ublications, and advertisements of any sort, a statement in letters of eight-point type or larger indicating that the limit was exceeded and disclosing the actual percentage of the total gross income raised as a result of fund-raising activities which was used for fund-raising exenses. The statement may indicate that the waiver of the 25-percent limitation on fund-raising expenses was authorized by the Secretary in accordance with the law.

STATEMENT OF THE CASE

A. The Statute and Regulations at Issue

The statute at issue in this case, Article 41, Section 103D of the Annotated Code of Maryland, provides for a flexible 25% limitation on a charity's fund-raising expenses. Section 103D does not mandate that a set amount or set percentage be spent by a charity on charitable puroses. Thus, a charity's administrative or other non-charitable expenses are in no way limited. The only expenditures that are in any limited are certain amounts spent solely on fund-raising.

Moreover, while §103D does prohibit a charity from paying or agreeing to pay fund-raising expenses "in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity," meeting such a requirement, however, is not a condition of securing registration. There is no provision for prior approval of contracts between a charitable organization and a professional fund-raiser in Maryland law. A mechanism which so provided was specifically deleted from the 1976 bill which later became §103D. See Chapter 679, Laws of Maryland for 1976. All that remains is a requirement that such contracts be filed with the Secretary of State. §103D(c). The only punishments for violating §103D are: (1) possible cancellation of registration (which is a discretinary rather than a mandatory penalty), Article 41, §103L(a) and (2) a criminal penalty, Art. 41, §103L(b).[1]

The Maryland law also contains major exemptions that further diminish the impact of the 25% restriction. Excluded from fund-

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[1] Authorization for a civil suit against a professional fund raiser by the charity was deleted from the 1976 bill. See Ch. 679, Laws of Maryland of 1976.

raising costs are all costs incurred for goods, food, entertainment, or drinks sold or provided to the public and for postage and printing expenses in connection with the solicitation. §103D(b). In addition, charities are free to pay and professional fund raisers are free to charge what they want -- without any limitation -- for "feasibility studies" and "preliminary planning." §103D(a).

Most importantly, the Maryland statute provides that:

> The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

These regulations illustrate the flexibility of the Maryland statute.[2] A charity can choose the applicable period during which the 25 percent limitation is in effect and can

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[2] In describing "a trend toward allowing more flexibility in the amount spent for fund raising," a 1977 study of the National Association of Attorneys General specifically took note of the Maryland statute. See NAAG, State Regulation of Charitable Trusts and Solicitation (Aug. 1977) at 31.

apply it retroactively on an annual basis or on a campaign-by-campaign basis. See COMAR 01.02.04.05A. The rules place no limit on the type of circumstances justifying relief from the percentage limitation. See COMAR 01.02.04.05B. Specifically identified as justifying an exemption is the case where "an organization is less than 2 fiscal years old and in the developmental stage" and "extraordinary, unusual and non-recurring circumstances." An organization can file for an exemption at any time, including after it actually exceeds the 25 percent limitation. COMAR 01.02.03.04B(3).

Finally, the Maryland law is being administered in a careful fashion with attention being paid to the First Amendment rights of advocacy groups. A 1980 Opinion of the Maryland Attorney General advised the Secretary of State that the 25 percent limitation was not to be considered as an advance requirement for registration; that a charitable organization be given a hearing before any attempt is made to cancel a registration for violation of §103D and that the Secretary consider staying such a cancellation attempt pending judicial affirmation. 65 Opinions of the Attorney General 58, 61, 64 (1980).

Significantly, the Attorney General advised that "the Secretary of State should not hesitate to grant waivers that are based on a responsible showing of justification, especially as regards the public-interest type organization described in the Schaumburg opinion." Id. at 65.[3]

B. The Proceedings Below

On March 7, 1978, the Joseph H. Munson Company, Inc. ("Munson"), an Indiana corporation operating as a professional promoter providing advice to organizations desiring to raise money, filed suit against Maryland's Secretary of State in the Circuit Court for Anne Arundel County, Maryland, seeking a declaration that it was not liable to register as a professional fund raiser under State law and that §103D of Article 41 of the Annotated Code of Maryland was unconstitutional as an unlawful delegation of legislative authority. In addition, Munson prayed for injunctive relief against enforcement of these statutes. Specifically, the firm alleged that its activities in Maryland were

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[3] Although the Respondent in this case admitted overcharges contrary to §103D since 1978, the Secretary of State did not take legal or punitive action against it or any of its clients.

limited to "advising its clients [various chapters of the Fraternal Order of Police] as to how to go about promoting a particular entertainment event" and that it "regularly charged" these chapters a fee in excess of 25 percent of the total gross income of the event. Following a motion to dismiss for failure to exhaust administrative remedies, the court dismissed the claims regarding registration of professional fund raisers but allowed the challenge to §103D to continue. The State answered and nothing occurred in the case for nearly two years, until an attempt was made to dismiss the suit for want of prosecution. After the suit was allowed to continue, Munson, on May 13, 1980, filed an amended complaint realleging the same factual averments but also raising for the first time a federal constitutional claim. The firm contended that the 25 percent limitation on fund-raising expenses contained in §103D "is unconstitutional and in violation of the First and Fourteenth Amendment[s] of the United States Constitution, as it violates the Plaintiff's right to free speech and assembly and unduly intrudes thereon." The State again answered and in an accompanying memorandum questioned Munson's standing

to bring its action.

The case was heard by the Circuit Court on the basis of a five-sentence stipulation which stated that Munson's contract with the Fraternal Order of Police called for a fee in excess of 25 percent of the net income raised via the event; that the organization was engaged in the dissemination of information and the advocacy of causes on behalf of police officers and that a single chapter of the Fraternal Order of Police was "reluctant" to enter into a contract with Munson because of §103D. The firm offered no evidence to show a connection between advocacy activities of the Fraternal Order of Police and Munson's dispensation of fund-raising advice or the particular events of individual chapters; or that any other chapter of the organization (allegedly being overcharged for fund-raising services since 1978) had refused Munson's services or was reluctant to engage them; or that any chapter of the Fraternal Order of Police had attempted to seek a waiver of the §103D limitation or was denied a requested waiver.

On July 2, 1980, the Circuit Court issued its opinion (App. 38a) upholding the

challenged statute. Relying upon National Foundation v. Fort Worth, 415 F.2d 41 (5th Cir. 1969), cert. denied 396 U.S. 1040 (1970) and distinguishing Village of Schaumburg v. Citizens for Better Environ., 444 U.S. 620 (1980), the Circuit Court held that §103D presented no prior restraint on protected activities and, because of the Secretary's power to grant exemptions to the 25 percent limitation, provided "a sufficiently flexible standard" to accommodate First Amendment rights (App. 46a). The court also found no invalid delegation of legislative power.[4] An appeal was taken by Munson to the Court of Special Appeals, which affirmed for primarily the same reasons. Joseph H. Munson Co., Inc. v. Secretary of State, 48 Md.App. 273, 426 A.2d 985 (1981)(App. 37a). The appellate court agreed there was no prior restraint and that the flexible Maryland statute with its many exceptions and provisions for waiver, fit the model of the law upheld in National Foundation as well as percentage limitation provisions upheld in Ohio, Holloway v. Brown, 62 Ohio St. 2865,

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[4] No mention was made in the Circuit Court opinion of the State's contention regarding standing.

403 N.E.2d 191 (1980) and the District of Columbia, National Black United Fund, Inc. v. Campbell, 494 F.Supp. 748 (D.D.C. 1980)(App. 34a). In conclusion the appellate court said:

> We think section 103D regulates First Amendment freedom of speech in such a way as to minimize encroachment upon individual rights while simultaneously protecting the citizenry of this State from sham and fraud. In sum, section 103D is drawn in a manner calculated to protect the public interest 'without unnecessarily interfering with First Amendment freedoms.' The statute is constitutional. (App.35a)[5]

Munson petitioned the Court of Appeals of Maryland for certiorari, contending that §103D was fatally overbroad on its face in violation of the First Amendment, and for the first time, arguing that in light of the waiver feature of §103D "the discretion vested in enforcement officials as a result of the lack of standards is itself an unconstitutional infringement on First Amendment interests." The Secretary of State cross-petitioned on the standing issue. The State's highest court agreed to hear the case

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[5] The Court of Special Appeals declined to consider the State's objection regarding Munson's standing, concluding that the issue had not been decided below. (App29a).

and reversed. First, the Court of Appeals concluded that under Schaumburg and Craig v. Boren, 429 U.S. 190, 193-197 (1976), Munson had standing to challenge the statute on its face (App. 13a). Second, without reference to the legislative history of §103D or its implementing regulations or the obvious record of its non-enforcement via a permit scheme, 65 Opinions of the Attorney General 58 (1980), the Maryland Court found an impermissible prior restraint (App. 13a). Third, the Court found no difference between the Maryland law and the statute invalidated in Schaumburg (App. 16a). In addition, the opinion suggested that the waiver feature of §103D at the same time conferred too much discretion on State officials and was "extremely narrow". (App. 20a). Thus, the Court held that §103D was violative of the First Amendment as overly broad and invalid on its face.

REASONS FOR GRANTING REVIEW

I.

THIS COURT SHOULD REVIEW THE INVALIDATION OF A PERCENTAGE RESTRICTION ON THE FUND RAISING COSTS OF CHARITIES, WHICH INVOLVES NO PRIOR RESTRAINT AND IS FLEXIBLE, MODERATE AND MORE LIMITED THAN PERCENTAGE REQUIREMENTS INDICATED AS ACCEPTABLE BY THIS COURT AND IN EFFECT IN MANY STATES.

The court below held Maryland's 25% limitation on a charity's fund-raising expenses -- a limitation which is not only modest but also flexible -- "invalid under the First Amendment of the United States Constitution." 448 A.2d at 947. To reach this holding the Maryland court created a per se rule that would effectively invalidate any percentage limitation in a charitable solicitation law.

Such a rule is unsanctioned by this Court. For this Court has never held that such percentage limitations are per se or intrinsically invalid. Indeed, in Schaumburg v. Citizens for Better Environ., 444 U.S. 620, 635-36 (1980), this Court indicated to the contrary by distinguishing the absolute and unrealistic ceiling on a charity's operations which it struck down in that case, from the flexible percentage ceiling on solicitation expenses upheld in National Foundation v. City of Fort Worth, 415 F.2d 41 (1969), cert. denied 396 U.S. 1040 (1970). And more recently in Larson v. Valente, 102 S.Ct. 1673 (1982), this Court again noted that evenhanded state regulation of charitable solicitation, including a provision for withdrawing the registration of an organization

spending "an unreasonable amount" for management, general and fund-raising costs, was not "intrinsically impermissible." Id. at 1688. Undoubtedly, it is because of this implicit approval of percentage limitations, and because of the simplicity and ease of administration afforded by such limitations, that many states have employed them to protect the contributing public and charitable beneficiaries from fraud and the charities themselves[6] from the unscrupulous practices of professional fund raisers.

However, if the per se rule adopted by the lower court is left undisturbed by this Court, and followed by the courts of other jurisdictions, it would seriously hinder any reasonable regulation of excessive fees charged charities by professional fund raisers. At present more than two-thirds of the states and numerous municipalities substantially regulate charitable solicitations both to protect the public and the

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[6] In fact, model state legislation to regulate charitable organizations proposed by thirteen national health charities, suggests a reasonable percentage limitation on fees paid professional fund raisers. See National Health Council, Model for State Legislation Regulating Charitable Organizations (1970).

charities. Moreover, twenty-one (21) states have established percentage limitations of varying degrees of flexibility and severity on the amounts a charity may pay to professional fund raisers or on those sums paid for solicitation and administration costs.[7] Many impose more difficult requirements than that contained in the Maryland statute. See, e.g. Mass. Gen. Laws Ann. Ch. 68, §21; N.H. Rev.

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[7] ARK. STAT. ANN., §64-1610 (25% to professional fund raiser); CONN. GEN. STAT., §19-323O (25% TO 50% sliding scale); FLA. STAT., §496.11 (25% to professional fund raiser); GA. CODE, §35-1008 (30% for fund raising and administrative costs); HAW. REV. STAT., §467B-7 (20% to professional fund raiser); I.. REV. STAT., §5108 (25% for fund raising and administrative costs); KAN. STAT., §17-1747 (25% for fund raising and administrative costs); MASS GEN. LAWS ANN., Ch. 68, §21 (15% to professional fund raiser); MINN. STAT., §309.555 (30% to professional fund raiser); N.H. REV. STAT. ANN., §320.20 (15% for fund raising and administrative costs); N.J. REV. STAT. §45.17A-10 (15% to professional fund raiser); N.D. CENT. CODE, §50-22-04.1 (35% total; 15% to professional fund raiser); OKLA. STAT., Tit. 18, §5523 (10% to professional fund raiser); OR. REV. STAT., §128.855 (25% for solicitation costs; 50% for solicitation and administration costs); PA. CONS. STAT. ANN., §160-6 (35% total; 15% to professional fund raiser; R.I. GEN. LAWS, 5-53-4 (50% total; 25% to professional rund raiser); S.C. CODE, ANN. §33-55-80 ("reasonable percent" to professional fund raiser); S.C. COM. LAWS ANN., §37-27-24 (30% to professional fund raiser); TENN. CODE ANN., §48-2213 (less than 25% to professional fund raiser creates rebuttable presumption of reasonableness); WASH. REV. CODE, §19.09.100 (20% for cost of solicitation); W.VA. CODE, §29-19-7 (15% to professional fund raiser).

Stat. Ann. §320.20; Okla. Stat., Tit. 18, §5523.

The critical mistake the Maryland court made was to attempt to analyze the Maryland statute as if it were the truly dissimilar statute condemned in Schaumburg. The Maryland statute and the regulations interpreting it are in fact light years away from the situation condemned in Schaumburg.

First, §103D imposes no prior restraint on protected activities. The Secretary of State has never administered §103D as a condition precedent to registration and was specifically advised not to do so. And the regulations of the Secretary permit a person to apply for an exemption from the 25 percent limitation even after §103D has been violated. Indeed, the Respondent in its brief below conceded that the Maryland statute is not "a prior restraint." Brief of Jossph H. Munson Co., Inc. at 12-13.[8] Both the trial

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[8] We do not contend that the absence of a prior restraint exempts State regulation of charitable solicitation from the requirements of the First Amendment. However, outside the area of prior restraint, State justifications for alleged interference with First Amendment rights do not have to meet an impossible burden. See Southeastern Promotion Ltd. v. Conrad, 420 U.S. 546 (1975). Absent a statutory prior

court and Maryland's intermediate appellate courts found no prior restraint. See Joseph H. Munson Co. v. Sec. of State, 48 Md.App. 273, 426 A.2d 985 (1981).

Second, this case has little, if anything, to do with speech or advocacy. Unlike Schaumburg, the record in this case does not reveal any connection between the dissemination of ideas and the charitable solicitation efforts of respondent's clients.[9] Respondent is an out-of-state professional fund raiser seeking to charge exorbitant fees for the sole function of "advising its [Maryland] clients as to how to go about promoting a particular entertainment event." It is hard to see how particular charities are harmed by a state law restricting the fees they must pay for such services. Surely, given the liberal provisions of Maryland's laws, there will always be professional fund raisers

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restraint, the respondent — a professional fund raiser — does not have standing to challenge the Maryland statute as overly broad as to advocacy groups. See infra.

[9] All the record discloses is that Respondent's clients — chapter of the Fraternal Order of Police — disseminate information and advocate causes. No such activity is described or in fact is related to particular charitable solicitations.

willing to offer such services at a 25 percent fee in Maryland, even if Munson is driven from the market.

Third, Maryland's law is a restriction on fund raising expenses not all non-charity related expenditures. In fact, in Schaumburg, the charity in question spent less than 25 percent of its income on fund raising and would not have encountered a problem under Maryland law. 444 U.S. at 626. Moreover, as outlined within, Maryland's percentage limitation contains so many generous features as to present little practical burden to a charity or responsible professional fund raiser.

Fourth, §103D is the kind of flexible limitation reviewed by this Court in National Foundation v. Fort Worth, 415 F.2d 41 (5th Cir. 1969), cert. denied 396 U.S. 1040 (1970) and endorsed in Schaumburg v. Citizens for a Better Environ., 444 U.S.620 (1980) and Larson v. Valente, 102 S.Ct. 1672, 1685 (1981). Indeed, §103D, which contains no element of prior restraint and which applies only to fund raising expenses, is an even more liberal statute than those discussed in Schaumburg and Valente.

II.

THE DEEP DIVISION AND MISUNDERSTANDING AMONG THE LOWER COURTS AS TO THE EFFECT OF THE SCHAUMBURG DECISION WHICH RESULTED IN THE UNSANCTIONED HOLDING BELOW, SHOULD BE RESOLVED BY THIS COURT.

In the two years since this Court's decision in Schaumburg, the lower courts have exhibited deep division as to the proper interpretation and true effect of that decision.

On one hand, the Supreme Court of North Dakota, State ex rel. Olsen v. WRG, 314 N.W.2D 842 (N.D. 1982), a federal district court in Missouri, Conlon v. City of North Kansas City, Missouri, 530 F.Supp. 985 (W.D. Mo. W.D. 1981) and most recently Maryland's highest court in this case, have misread Schamburg concluding that it mandates that all percentage limitations on charitable fundraising costs are per se unconstitutional. However, in the North Dakota case the challenged statute was far more restrictive than the Maryland statute at issue here; it limited charitable fund-raising expenses to 15% rather than 25%. Moreover, that case involved a prosecution by the state for alleged violation of the statute so that

there were none of the standing problems present in this case. See infra. The North Kansas City ordinance at issue in Conlon required a permit or certificate of registration before any solicitation by a charity and anyone soliciting without such a permit was subject to arrest. 530 F.Supp. at 990. Thus both earlier cases involve facts which put them closer to the Schaumburg than the case at hand. Moreover this Court, less than six months ago, after both State ex rel. Olsen v. WRG, supra, and Conlon v. City of North Kansas City, Missouri, supra, reiterated its view that a state regulation of charitable solicitation which permitted withdrawal of registration from a charity spending "an unreasonable amount" for management, general and fundraising costs" was not "intrinsically impermissible", Larson v. Valente, 102 S.Ct. 1673, 1688 (1982). Nevertheless, the Court below concluded fundraising percentage limitations were unconstitutional per se and thus Maryland's moderate, flexible limitation must fall.

On the other hand, the Supreme Court of Ohio, Holloway v. Brown, 62 Ohio St.2d 65, 403 N.E.2d 191 (1980) and the District Court for the District of Columbia, National Black

United Fund, Inc. v. Campbell, 494 F.Supp. 748, 759-60 (D.D.C. 1980), reversed on other grounds, 667 F.2d 173 (D.C. Cir. 1981), and both the trial court (App. 38a)and the intermediate appellate court (App. 23a) in this case have determined that Schaumburg does not require this result. See also, Bread Political Action v. Federal Election Comission, 635 F.2d 621,629 (7th Cir. 1980), reversed on other grounds, 102 S.Ct. 1235 (1982). Rather, they have concluded that in Schaumburg, this Court, at least indicated, that a moderate flexible percentage limitation on charitable fundraising costs, particularly if such a limitation was not part of a scheme which contained a prior restraint on speech, was permissible, and so upheld such carefully crafted statutes. This view, it may be noted, is shared by the commentators. See Village of Schaumburg v. Citizens for a Better Environment and Religious Solicitation: Freedom of Speech and Freedom of Religion Converge, 13 Loyola of Los Angeles Law Rev. 953, 955 (1980)("The Schaumburg opinion suggests that certain types of state regulations can be maintained against even constitutionally protected solicitation"); 9 Fla. State Univ. Law Rev. 185,

192 (1981)(the Court "implicitly approved the ordinance in National Foundation as an appropriate alternative to the inflexibility of the Schaumburg ordinance").

The latter conclusion is, we believe, for the reasons set forth within, not only clearly correct as a matter of constitutional law but also critically important to any effective regulation of excessive and unreasonable fundraising fees. Certiorari should be granted here so that this important public policy question, upon which the lower courts are so obviously divided and which affects many of the states and numerous local municipalities, can definitively be resolved by this Court.[10]

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10 The flexibility of a statute imposing a 25% limit on solicitation costs as part of a licensing scheme was an issue in Fernandes v. Limmer, 663 F.2d 619 (5th Cir. 1981), petition for certiorari dismissed under Rule 53, 51 U.S.L.W. 3174 (Sept. 7, 1982). However that case, unlike the present one, was decided on the basis of the First Amendment's protection of religious freedom. Moreover, to the limited extent it would have presented issues similar to those in the case at hand, its dismissal eliminates the possibility of consideration of those issues by this Court in any pending case other than the one at hand.

III.

REVIEW BY THIS COURT IS NECESSARY TO RECTIFY AN UNTHINKING AND UNWARRANTED DEPARTURE FROM TRADITIONAL RULES OF STANDING THAT IS CLEARLY AT ODDS WITH DECISIONS OF THIS COURT.

Under traditional rules governing constitutional adjudication, a person to whom a statute may constitutionally be applied will not be heard to challenge the law as applied to others. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973). There are a number of exceptions to this rule, notably cases involving certain First Amendment facial overbreadth challenge and certain claims of a litigant that a single application of a law both injures him and others [hereinafter referred to as jus tertii standing]. See Note: Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 424 (1974). However, this Court, unlike the lower court here, has never allowed these exceptions to swallow up the rule.

In Broadrick v. Oklahoma, supra, at 613, this Court said that liberalized standing in First Amendment overbreadth cases is "strong medicine" and has been employed "sparingly and only as a last resort." And in Erznoznik v. City of Jacksonville, 422 U.S. 205, 216

(1975), this Court said that when considering a facial challenge, "it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." It is for this reason that this Court has said that for liberalized standing in First Amendment overbreadth cases to exist "the overbreadth of a statute must not only be real, but substantial as well, judged in relation fo the statute's plainly legitimate sweep." Broadrick v. Oklahoma, supra, at 615.

Similarly, where jus tertii standing is alleged, this Court has generally focused on three factual elements to determine whether such standing should be accorded: (1) the presence of some substantial relationship between the litigant and third parties; (2) the impossibility of the third parties asserting their own constitutional rights; and (3) the need to avoid a dilution of third party rights that would result were the assertion of jus tertii not permitted. Singleton v. Wulff, 428 U.S. 106, 114-116 (1976); Note: Standing to Assert Constitutional Jui Tertii, 88 Harv. L. Rev. 423, 425 (1974).

The lower court has cast aside these principles of self-restraint in its rush to squeeze the Maryland statute into the Schaumburg mold. First, the Maryland Court improperly extended Schaumburg, a prior restraint case, with a factual record of real and substantial overbreadth, to a situation where none of these elements were present.

Schaumburg quite properly reflected a desire to accord liberalized standing where protected speech or conduct fell victim to the power of the censor. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940)("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression."). However, "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." Broadrick v. Oklahoma, supra, at 614-15. The Maryland statute and implementing regulations which allow a group to obtain a waiver of the 25-percent fundraising limitation even after that limit has been exceeded, COMAR 01.02.04.05B(3), clearly do not reveal the

hand of the censor.

Moreover, the factual predicate of real and substantial overbreadth apparent in Schaumburg is lacking here. The Schaumburg ordinance was challenged by an advocacy group that had established a relationship between its advocacy and its fundraising and that was effectively put out of business by an inflexible ceiling on all non-charitable expenditures. Schaumburg v. Citizens for a Better Environ., supra, at 626. Here, the Maryland law has been challenged by a professional fund raiser with no tangible First Amendment claim of its own who routinely overcharged Maryland organizations since 1978, apparently without fear of prosecution or penalty for itself or its clients. In addition, the sparse record establishes no connection between alleged advocacy activities of Munson's clients and the firm's furnishing of advice, or shows that any organization attempted to obtain a waiver of the 25-percent limitation which the Attorney General of Maryland had advised the Secretary of State to freely grant. Unlike the organization in Schaumburg, Munson clearly failed to show a real and substantial overbreadth necessary to assert the claims of its clients.

Nor does this Court's jus tertii decsions warrant liberalized standing in this case. Such standing requires factual predicates not present in this facial challenge to the Maryland statute. For example, there is no factual connection between Munson's services and the advocacy interests of its clients or any demonstration that the organizations will not be able to obtain the same services from others at a fee permitted under §103D. There is no reason to believe that the organizations themselves, which have neither suffered detriment from §103D nor sought a waiver of its provisions, will have their rights diluted or will be precluded from challenging the statute should the need ever arise.

For all of these reasons, the State contends that the Maryland Court's wide departure from the principles of this Court's standing cases and its unwarranted extension of Schaumburg beyond its reasonable perimeters furnishes an additional ground for review of this case.

CONCLUSION

Shortly after its enactment, the Maryland law at issue here was praised in a

national study as reflecting "a trend toward allowing more flexibility in the amount spent for fund raising." See NAAG, State Regulation of Charitable Solicitation (Aug. 1977) at 31. This "trend" has been encouraged by the Court in the National Foundation case and continued by the careful distinctions drawn in Schaumburg. However, if decisions like that of the Maryland Court in this case are allowed to stand, the trend toward flexibility in fund raising regulation will see its end and a host of reasonable fund raising limitations in other states and municipalities will be eviscerated. For these reasons and those stated above, we urge the Court to issue a writ of certiorari to the Court of Appeals of Maryland to review the judgment it entered on August 5, 1982.

Respectfully submited,

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APPENDIX

OPINION

(Filed August 5, 1982)

In The Court of Appeals of Maryland

No. 42

September Term, 1981

Joseph H. Munson Company, Inc.

v.

Secretary of State of The State of Maryland

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*Murphy, C.J., Smith, *Digges, Eldridge, Cole, Davidson, Rodowsky, JJ.*

Opinion by Eldridge, J.

The principal issue in this case is whether Maryland Code (1957, 1978 Repl. Vol.), Art. 41, § 103D, which places

* Digges, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

a limit upon the amount of expenses that a charitable organization may pay in connection with fund-raising activity, violates the First Amendment to the United States Constitution. A second issue concerns the standing of the plaintiff to raise this question.

Art. 41, § 103D, prohibits a charitable organization, in connection with any fund raising activity, from paying or agreeing to pay as expenses more than 25 percent of the gross amount raised. The statute also states that the Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay as expenses more than 25 percent of the amount raised where the 25 percent limitation would "effectively prevent the charitable organization from raising contributions."

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[1] Art. 41, § 103D(a) and (b), states:

"§ 103D. Limitations on amount of payments for solicitation activities.

(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

"The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-

Section 103D is part of a comprehensive subtitle, enacted by Ch. 679 of the Acts of 1976, for the purpose of regulating charitable organizations and charitable solicitations. *See* Art. 41, § 103A-103L. For example, § 103B provides for the registration of charitable organizations with the Secretary of State and the furnishing of detailed financial data to the Secretary. Under § 103F, one may not act as a professional fund-raiser counsel or a professional solicitor for a charitable organization unless he also registers with the Secretary, furnishes certain information, pays an annual fee, files a bond, and complies with the requirements of the subtitle. Section 103D(c) states that "[e]very contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State within ten days after it is entered into and prior to any solicitations." Under § 103L(a), a charitable organization, professional fund-raiser counsel or professional solicitor is subject to criminal liability for wilfully violating the requirements of

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raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

"(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs."

the subtitle.[2] Other sanctions for violating the subtitle are contained in § 103L(b) and (c).[3]

The Joseph H. Munson Co., Inc., instituted this action in the Circuit Court for Anne Arundel County, seeking declaratory and injunctive relief against the Secretary of State. Munson is in the business of promoting fund raising events and giving advice to clients on how those events should be conducted. In Maryland, Munson's clients consist of various chapters of the Fraternal Order of Police. In its amended bill of complaint, Munson alleged that it "regularly charges the said chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event which it is involved in promoting." Munson further alleged

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[2] Art. 41, § 103L(a) provides (emphasis supplied):

"(a) A charitable organization, professional fund-raiser counsel, or professional solicitor which wilfully fails to file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, *or otherwise wilfully violates the requirements of this subtitle*, is guilty of a misdemeanor, and upon conviction, shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned. An officer, director, partner, or trustee of a charitable organization, professional fund-raiser counsel, or professional solicitor which is organized in corporate, partnership, or other organizational form who causes the entity to commit a wilful violation of this subtitle is also guilty of a misdemeanor, and, upon conviction, is subject to the same penalties as the entity."

[3] Art. 41, § 103L(b) and (c) provides:

"(b) The Secretary of State is authorized, upon complaint or upon his own motion, to investigate alleged violations of this subtitle. If he finds that a charitable organization, professional fund-raiser counsel, or professional solicitor has violated a provision of this subtitle, he may:

(1) Cancel and annul the registration of the violator;

(2) Refer the matter to the Attorney General for civil enforcement under subsection (c); and

(3) Refer the matter to the appropriate State's attorney for prosecution.

that it had been in contact with the Secretary of State, and that the Secretary had taken the position "that the Plaintiff is subject to [§ 103D] . . . and that the continued failure to comply therewith will require the Defendant to seek prosecution of the Plaintiff for violation of the said statute." In counts I and II of its five-count amended bill of complaint,[4] Munson sought a declaratory judgment as to whether it was subject to the registration and 25 percent fund-raising limitation provisions of the statute, as well as injunctive relief. In count III, Munson prayed a declaratory judgment that § 103D contained an unconstitutional delegation of legislative authority to the Secretary of State. In count V, Munson sought a declaration that § 103D on its face violates the First and Fourteenth Amendments to the United States Constitution, on the ground that the 25 percent fund-raising limitation unduly intrudes upon Munson's right to free speech and assembly. Finally, in count IV, Munson asked for an injunction restraining the Secretary from enforcing § 103D.

In its answer, the Secretary did not flatly deny that he had initially threatened Munson with criminal prosecution. Instead, the Secretary's denial of the allegation concerning threatened prosecution was on the ground that "there had been no determination concerning the applicability of the statute to the Plaintiff or that he is in violation of the Charitable Solicitation Act." The Secretary

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(c) Upon referral by the Secretary of State, the Attorney General may file a civil action in the Circuit Court for Anne Arundel County for an order restraining further violations of this subtitle, restraining the defendant from conducting any further fund-raising activities in Maryland, enforcing compliance with this subtitle, and such other relief as he deems appropriate. As a condition of registration, each charitable organization, professional fund-raiser counsel, and professional solicitor shall consent in writing to the jurisdiction and venue of the Circuit Court for Anne Arundel County to grant appropriate relief."

[4] We note that the use of counts in a bill in equity is inappropriate. Nick-George Ltd. v. Ames-Ennis, Inc., 279 Md. 385, 387 n.1, 368 A.2d 1001 (1977), Maryland Rule 370 a 1.

sought a dismissal of counts I and II on the ground that Munson had not exhausted administrative remedies created by regulations of the Secretary of State. Otherwise, the Secretary asserted that § 103D was constitutional. In a memorandum accompanying the Secretary's answer, the Secretary stated that it "seriously questions Plaintiff's standing to seek a declaratory judgment." In a supplemental memorandum of law, the Secretary argued that Munson lacked standing.

No testimony was taken in the circuit court. Instead, according to the opinion of the circuit court, the case was decided on the pleadings, the memoranda of law submitted, and a stipulation of facts. One of the stipulated facts was that "the Fraternal Order of Police, Montgomery County Chapter, . . . is reluctant to enter into a contract with the Plaintiff . . . for promotion of fund raising events due to the limitation imposed by Article 41, Section 103, . . . that nothing in excess of 25% of the gross income raised through fund raising activities may be expended on fund raising expenses." It was also stipulated that Munson's contracts with Fraternal Order of Police Chapters call for a fee for each event in excess of 25% of the *net* income raised.

The circuit court dismissed counts I and II of the amended bill of complaint on the ground that Munson had failed to exhaust administrative remedies. With regard to counts III and V, the court issued a detailed opinion and declaratory judgment that § 103D was facially valid, and that it neither amounted to an unconstitutional delegation of legislative authority nor violated the free speech guarantee of the First and Fourteenth Amendments. The court accordingly refused to enjoin enforcement of § 103D.

Munson took an appeal to the Court of Special Appeals, contending only that § 103D on its face violated the First and Fourteenth Amendments. The Secretary took no cross-appeal. The Court of Special Appeals affirmed, *Joseph H. Munson Co. v. Sec. of State*, 48 Md. App. 273, 426 A.2d 985 (1981). Munson then filed a petition for a writ of

certiorari, raising only the free speech issue under the First and Fourteenth Amendments, and the Secretary filed a cross-petition, asserting that Munson lacked standing to challenge the First Amendment validity of § 103D. We granted both the petition and the cross-petition.

I. *Standing*

A

Although we granted the Secretary's cross-petition challenging Munson's standing, a preliminary question is raised by Munson as to whether we should consider this issue. We shall assume that the Secretary properly raised the issue in the circuit court when, in a memorandum of law, it argued that the action should be dismissed for lack of standing. Instead of dismissing the action, however, the trial court in effect upheld Munson's standing and rendered a declaratory judgment on the merits of the constitutional issues presented in counts III and V of the bill of complaint. Although Munson took an appeal from the declaratory judgment, the Secretary did not file an order of appeal. Munson argues in this Court that, because of the Secretary's failure to take a cross-appeal on the issue of standing, the issue is not properly before us.

Under circumstances where absence of standing would present an alternate ground for upholding a trial court's judgment, an appellee is entitled to argue that ground in an appellate court. *Temony v. State*, 290 Md. 251, 261, 429 A.2d 1018 (1981), and cases there cited. In such situation, a cross-appeal would be unnecessary and, in fact, would be improper. *Offutt v. Montgomery Co. Bd. of Ed.*, 285 Md. 557, 564 n. 4, 404 A.2d 281 (1979). Moreover, in that situation, even if lack of standing were not raised by the appellee, an appellate court noticing the issue would normally consider it sua sponte under the principle that a judgment will ordinarily be affirmed on any ground adequately shown by the record, whether or not relied on by the trial court or raised by a party. *Robeson v. State*, 285 Md. 498, 502, 403 A.2d 1221 (1979), *cert. denied*, 444 U.S. 1021, 100 S. Ct. 680, 62 L. Ed. 2d 654 (1980).

Thus, in the case at bar, if the trial court had dismissed the action on some ground other than lack of standing, the Secretary as appellee would be entitled to argue Munson's alleged lack of standing as an alternate basis for affirmance. However, the trial court did not dismiss the action. Instead, it rendered a declaratory judgment on the merits. Munson's alleged lack of standing would not furnish an alternate ground for affirming the declaratory judgment. On the contrary, the Secretary's argument amounts to an attack upon the judgment. If the issue is properly before us, and if we agreed that Munson had no standing, we would be obliged to order that the trial court's judgment be reversed and that the case be remanded with directions to dismiss the action.

Consequently, the Secretary is attempting to challenge the trial court's judgment in this case without having taken an appeal. A party to a trial court proceeding, however, is not entitled to seek direct appellate review and reversal of the trial court's judment unless he has filed a valid, timely order of appeal. *See, e.g., Pearlman v. State*, 226 Md. 350, 173 A.2d 733 (1961); *Riviere v. Quinlan*, 210 Md. 76, 122 A.2d 332 (1956); *Gaines v. Lamkin*, 82 Md. 129, 33 A. 459 (1895); *Hopper v. Jones, Adm'r*, 64 Md. 578, 4 A. 273 (1886); *Walters v. Second Nat'l Bank of Baltimore*, 56 Md. 138 (1881); 2 Poe, *Pleading and Practice* §§ 823-824 (5th ed. H. Tiffany 1925); Maryland Rules 1010, 1011. The Secretary, not having filed an order of appeal, may not on appeal attack the trial court's declaratory judgment. Furthermore, the filing of a cross-petition for a writ of certiorari in this Court cannot overcome the failure of a purported cross-appellant to have taken an appeal from the trial court's judgment.

While the Secretary is in no position to challenge the trial court's judgment, the standing issue may be that type of question which we will resolve on our own motion. When a case is properly before us on an order of appeal and writ of certiorari, we will sua sponte address a narrow category of issues which come to our attention even

though not raised by an appellant, and which may require a reversal of the judgment below. This category includes the jurisdiction of the intermediate appellate court, the jurisdiction of the trial court, and the certain fundamental questions of policy relating to the trial court's exercise of jurisdiction. *See, e.g., Creamer v. Helferstay,* Md. , A.2d (1982) [No. 7, September Term, 1981, decided August 4, 1982] (authority of the trial court to grant a particular type of relief); *Sec., Dep't of Human Res. v. Wilson,* 286 Md. 639, 644-645, 409 A.2d 713 (1979) (failure to exhaust administrative remedies); *Attorney Gen. v. A. A. Co. School Bus,* 286 Md. 324, 407 A.2d 749 (1979) (mootness); *Biro v. Schombert,* 285 Md. 290, 293, 402 A.2d 71 (1979) (jurisdiction of the Court of Special Appeals); *Reyes v. Prince George's County,* 281 Md. 279, 282-283, 380 A.2d 12 (1977) (whether suit is collusive); *Harford County v. Schultz,* 280 Md. 77, 371 A.2d 428 (1977) (whether there is an "actual controversy" between contending parties within the meaning of the Declaratory Judgments Act); *State v. McCray,* 267 Md. 111, 126, 297 A.2d 265 (1972) (subject matter jurisdiction of the trial court). *See also Smith v. Taylor,* 285 Md. 143, 147, 400 A.2d 1130 (1979) (jurisdiction of this Court).

Several Maryland cases, however, indicate that questions concerning the plaintiff's standing to maintain the action do not fall within this category. They take the position that, if the plaintiff's alleged lack of standing is not properly raised by the defendant, an appellate court will not consider the matter. *See Toomey v. Gomeringer,* 235 Md. 456, 460-461, 201 A.2d 842 (1964); *Costello v. Seiling,* 223 Md. 24, 29, 161 A.2d 824 (1960); *Pressman v. Baltimore,* 222 Md. 330, 334, 160 A.2d 379 (1960); *Baltimore v. N.A.A.C.P.,* 221 Md. 329, 332, 157 A.2d 433 (1960); *Pumphrey v. Pumphrey,* 11 Md. App. 287, 292-293, 273 A.2d 637 (1971). On the other hand, some cases seem to suggest that the standing of a plaintiff to maintain an action is an issue which an appellate court will address on its own motion. *Reyes v. Prince George's County, supra,* 281 Md. at 287-289; *Ginn v. Farley,* 43 Md. App. 229, 232,

403 A.2d 858 (1979); *cert. denied sub nom. Engel v. Farley*, 286 Md. 747 (1980); *Balance Limited, Inc. v. Short*, 35 Md. App. 10, 11, 368 A.2d 1116 (1977). *See also Craig v. Boren*, 429 U.S. 190, 192-194, 97 S. Ct. 451, 20 L. Ed. 2d 397 (1976). The rationale for this view would appear to be that, if a plaintiff lacks standing, there may be no "interested parties" asserting adverse claims, and thus there may be no "justiciable controversy," which is a matter regularly noticed by appellate courts sua sponte. *Reyes v. Prince George's County, supra*, 281 Md. at 288; *Harford County v. Schultz, supra*. *See also Patuxent Co. v. Commissioners*, 212 Md. 543, 548-549, 129 A.2d 847 (1957).[5]

Whether there is a conflict among the above-cited cases, and whether Munson's standing is an issue properly before us, are questions which need not be resolved in the present case. If we assume for purposes of argument that the issue is before us despite the Secretary's failure to take a cross-appeal, the result will be no different, for we believe that Munson clearly had standing to challenge the facial constitutionality of Art. 41, § 103D.

B

The Secretary's contention that Munson has no standing to attack the constitutionality of § 103D seems to have two related prongs. First, the Secretary argues that § 103D only applies to charitable organizations and there has been no final administrative determination that the various chapters of the Fraternal Order of Police with which Munson contracts are charitable organizations within the meaning of § 103D. Munson, according to the Secretary, failed to exhaust its administrative remedies in this regard. Second, the Secretary contends that even if

[5] "Standing," of course, does involve principles beyond the requirement of a "justiciable controversy." Craig v. Boren, 429 U.S. 190, 193-194, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); Warth v. Seldin, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975); Eisenstadt v. Baird, 405 U.S. 438, 443-445, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

the Fraternal Order of Police chapters are charitable organizations, Munson may not assert their First Amendment rights.

However, Munson has clearly suffered injury as a result of § 103D, as the stipulation of facts in the trial court was that the Montgomery County Chapter of the Fraternal Order of Police would not contract with Munson for promotion of fund-raising events because of the 25 percent limitation imposed by § 103.

Furthermore, Munson alleged that the Secretary had been in contact with Munson's counsel, had taken the position that Munson is subject to § 103D, and had stated that, if Munson failed to comply with the statute, the Secretary would seek prosecution of Munson. The Secretary's denial of this allegation was because there had been no final determination by the Secretary concerning the applicability of the statute to Munson or whether Munson was in violation of § 103D. Thus, the Secretary is essentially arguing a failure to exhaust administrative remedies. We have consistently held, however, that when one is attacking the validity of a statute on its face, rather than a particular application of the statute, administrative remedies ordinarily need not be exhausted. *National Asphalt v. Prince Geo's Co.*, 292 Md. 75, 77, n. 2, 437 A.2d 651 (1981); *Shipp v. Bevard*, 291 Md. 590, 599, 435 A.2d 1114 (1981); *Harbor Island Marina v. Calvert Co.*, 286 Md. 303, 308-309, 407 A.2d 738 (1979), and cases there cited.

The contention that Munson may not assert the First Amendment rights of the Fraternal Order of Police Chapters with which Munson normally contracts, is also without merit. Although ordinarily one may not assert the constitutional rights of others, nevertheless where a statute is directed at persons with whom the plaintiff has a business or professional relationship, and impairs the plaintiff in that relationship with such other persons, thereby threatening real and immediate injury to the plaintiff, he is normally accorded standing to challenge the

validity of the statute. *Craig v. Boren*, *supra*, 429 U.S. at 194-197; *Singleton v. Wulff*, 428 U.S. 106, 112-118, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 443-446, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-536, 45 S. Ct. 571, 69 L. Ed. 1070 (1925); *Baltimore v. A. S. Abell Co.*, 218 Md. 273, 281-282, 145 A.2d 111 (1958).

Finally, an argument similar to that which the Secretary makes here was rejected in *Schaumburg v. Citizens For Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980), also involving a challenge to a charitable solicitation statute imposing a limitation like that in Art. 41, § 103D. In *Schaumburg*, the soliciting organization (CBE) had obtained summary judgment declaring the statute void and enjoining its enforcement. The defendant argued in the Supreme Court that summary judgment was inappropriate because "there was an unresolved factual dispute concerning the true character of CBE's organization" and that the defendant should have had an opportunity to show that CBE "may appropriately be deemed an organization existing for private profit rather than for charitable purposes." 444 U.S. at 633. In rejecting this argument, the Supreme Court stated (*id.* at 633-634) (footnote omitted):

> "We agree with the Court of Appeals that CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit cavassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations. Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. *Grayned v. City of Rockford*, 408 U.S. 104, 114-121 (1972); *Chaplinsky v.*

> *New Hampshire*, 315 U.S. 568 (1942); *Schneider v. State*, 308 U.S., at 162-165; *Lovell v. Griffin*, 303 U.S., at 451; *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). See also the discussion in *Broadrick v. Oklahoma*, 413 U.S. 601, 612-616 (1973); and in *Bigelow v. Virginia*, 421 U.S. 809, 815-817 (1975). In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute."

We hold, therefore, that Munson had standing to challenge the facial validity of § 103D.

II. *Constitutionality Of § 103D*

In our view, the Supreme Court's opinion in *Schaumburg v. Citizens For Better Environ., supra*, is also dispositive of the merits, and requires a declaration that § 103D is unconstitutional under the First and Fourteenth Amendments.

Schaumburg involved a municipal ordinance which required that every charitable organization intending to solicit contributions in the village " 'by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit.' " 444 U.S. at 623. The permit application had to contain satisfactory proof " 'that at least seventy-five per cent of the proceeds of such solicitation will be used directly for the charitable purpose of the organization.' " *Id.* at 624. CBE, an environmental organization which solicited contributions from door-to-door, and which could not demonstrate that it would use 75 percent of the receipts for charitable purposes, brought an action for declaratory and injunctive relief.

The Supreme Court in *Schaumburg* held that the expense limitation provision of the ordinance, requiring that 75 percent of the funds collected be used for

charitable purposes, violated the free speech clause of the First Amendment, applicable to state legislation under the Fourteenth Amendment. In reaching this conclusion, the Court rejected the Village's argument that charitable solicitation is not "speech" protected by the First Amendment as long as the charity is free to propagate its views. The Court discussed and relied on several cases holding that the charitable, religious or other solicitation is protected by the First Amendment. *Schneider v. State*, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); *Jamison v. Texas*, 318 U.S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (1943); *Largent v. Texas*, 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); *Martin v. Struthers*, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943); *Thomas v. Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); *Hynes v. Mayor of Ordell*, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976). The Court also relied on *Valentine v. Chrestensen*, 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), and *Breard v. Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), involving commercial solicitation, with the Court noting (444 U.S. at 632-633, n.7) that today, under *Va. Pharmacy Board v. Va. Consumer Counsel*, 425 U.S. 748, 758-759, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), commercial speech is not excluded from First Amendment protections. After reviewing these cases, the Court stated (444 U.S. at 632):

> "Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social

> issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease."

The Court then set forth what it regarded as the issue in the case (*id.* at 633):

> "The issue before us, then, is not whether charitable solicitations in residential neighborhoods are within the protections of the First Amendment. It is clear that they are. '[O]ur cases have long protected speech even though it is in the form of . . . a solicitation to pay or contribute money. *New York Times Co. v. Sullivan* [376 U.S. 254 (1964)].' *Bates v. State Bar of Arizona*, 433 U.S., at 363.
>
> "The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech."

In considering whether the expense limitation unduly intruded upon free speech, the Court in *Schaumburg* characterized "the 75-percent limitation [as] . . . a direct and substantial limitation on protected activity that cannot be sustained unless it serves a strong, subordinating interest that the Village is entitled to protect." 444 U.S. at 636. Pointing out that prevention of fraud was the Village's principal justification (*ibid.*), the Court stated that many charitable organizations may use more than 25 percent of the receipts for salaries, research, etc., and that a governmental body "consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing," *id.* at 636-637. The Court, in striking down the ordinance, concluded that the "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and penal laws used to punish such conduct directly." *Id.* at 637.[6]

[6] The Court in *Schaumburg* also pointed out that requiring public "disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed." 444 U.S. at 638.

The Secretary of State argues that the instant case is distinguishable from *Schamburg* in two significant respects. It is contended that, in light of these two distinctions, the 25 percent expense limitation in § 103D is valid under the principles set forth in *Schaumburg*.

First, the Secretary states that *Schaumburg* involved a "prior restraint" upon charitable solicitation, as solicitation from door-to-door or solicitation using the public streets was absolutely prohibited unless a permit was first obtained. Under § 103D, the Secretary's argument continues, solicitation is permitted without having to obtain a permit from an administrative official. The Secretary asserts "that the Maryland statute does not impose any prior restraints on the solicitation and collection of funds." (Brief, p. 11). According to the Secretary, it is only when the solicitation is in violation of the statute that it becomes prohibited and subject to the criminal penalty in § 103L(a). The Secretary, in oral argument before us, urged that the criminal penalty under the Maryland statute was the type of criminal sanction to prevent fraud of which the Supreme Court approved in *Schaumburg*.

Preliminarily, with regard to the matter of "prior restraint," we point out that the distinction between the two statutes is not as clear-cut as the Secretary's argument seems to suggest. It is not a situation where one statute involves complete prior restraint upon charitable solicitation whereas the other statute involves no prior restraint. In fact, the Maryland Act would seem to involve a much more sweeping "prior restraint" upon protected speech than the *Schaumburg* ordinance. The *Schaumburg* ordinance required a permit only to solicit from door-to-door or by using the public streets. No permit was required for other types of charitable solicitation. Under the Maryland statute, before any charitable organization, professional fund-raiser counsel or professional solicitor is entitled to engage in *any* form of charitable solicitation, it must first submit an application to register with the Secretary of State, submit information under oath, pay a

fee, and meet other requirements. Art. 41, §§ 103B and 103F. Furthermore, under § 103F(d), no solicitation may begin until the Secretary "shall approve the registration" of a professional fund-raiser counsel or professional solicitor. And he is only to approve such registration if he finds that the application is in conformity with the requirements of the subtitle as well as the rules and regulations of the Secretary. *Ibid.*[1] It would seem that the difference

[1] Art. 41, § 103F, provides as follows:

"§ 103F. Registration of professional fund-raiser counsel and professional solicitor; bonds.

(a) A person may not act as a professional fund-raiser counsel or professional solicitor for a charitable organization unless he has first registered with the Secretary of State. Applications for registration shall be in the form prescribed by the Secretary of State, shall contain the information required by him, and shall be under oath. The application for registration by a professional fund-raiser counsel or a professional solicitor or renewal of it shall be accompanied by an annual fee of $100. A partnership, corporation or other entity which intends to act as a professional fund-raiser counsel or professional solicitor, may register for and pay a single fee of $100 on behalf of all its members, officers, agents, and employees. However, the names and addresses of all officers, agents, and employees, of the professional fund-raiser counsel or professional solicitor, and all other persons employed to work under its direction must be listed in the application.

(b) Every professional fund-raiser and professional solicitor shall, at the time of making application, file with and have approved by the Secretary of State a bond in which the applicant shall be the principal obligor in the sum of ten thousand dollars ($10,000) with one or more sureties satisfactory to the Secretary of State, whose liability in the aggregate as such sureties will at least equal the sum and maintain the bond in effect so long as a registration is in effect. The bond shall run to the State of Maryland for the use of the State and any person who may have a cause of action against the obligor of the bonds for any losses resulting from malfeasance, nonfeasance or misfeasance in the conduct of solicitation activities. A partnership or corporation which is a professional fund-raiser may file a consolidated bond on behalf of all its members, officers and employees.

(c) Each registration is valid for one year and may be renewed for additional one-year periods upon application to

between a "permit" issued by an administrative official and an "approval" of a registration application issued by an administrative official is purely a semantic one.

The Maryland statute involves a "prior restraint" upon speech in other respects. Under § 103D(c), every contract between a charitable organization and a professional fund-raiser counsel or professional solicitor must be submitted to the Secretary of State within ten days of the contract. A charity which contracts with a professional fund-raiser counsel or professional solicitor to pay as expenses more than 25 percent of the gross income raised, must under § 103D obtain a "permit" from the Secretary of State before charitable solicitation under the contract can begin.

Another example of prior restraint is found in § 103L(b) and (c). Under that section, if the Secretary believes that a charitable organization, professional fund-raiser counsel or professional solicitor has violated a provision of the subtitle, he may cancel the alleged violator's registration, or he may refer the matter to the Attorney General who is authorized to seek a court order "restraining the defendant from conducting any further fund-raising activities in Maryland."

Apart from the degree of "prior restraint" in the Maryland statute, we do not believe that, in the context

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the Secretary of State, payment of the renewal fee, and proof that the required bond, cash, or cash equivalent is and will remain in effect.

(d) If the Secretary of State finds that the application is in conformity with the requirements of this section and the rules and regulations adopted pursuant to it, and that the registrant has complied with the requirements of this subtitle and the rules and regulations adopted pursuant to it, he shall approve the registration. An applicant whose application for registration is denied, may within 30 days from the date of notification of the denial, request in writing a hearing before the Secretary of State. A hearing shall be held within 60 days from the date the Secretary of State receives the request."

here, there is any merit in the distinction drawn by the Secretary between "prior restraint" of a form of speech and criminal sanctions for engaging in a form of speech. In *Schaumburg*, the Court clearly held that charitable solicitation for funds is protected speech within the meaning of the First Amendment, and that a 25 percent limit upon the amount that could be paid for expenses unduly intruded upon the right of free speech. The Court in no way suggested that enforcement of this limitation by a criminal sanction, as opposed to a permit requirement, would make it substantially less an intrusion upon free speech. On the contrary, in reaching its conclusion, the Supreme Court relied on several cases involving criminal sanctions for solicitation rather than permit requirements. *See Hynes v. Mayor of Ordell, supra*, 425 U.S. at 612-613; *Breard v. Alexandria, supra; Martin v. Struthers, supra; Jamison v. Texas, supra, Valentine v. Chrestensen, supra.*

Lastly, it is clear that the criminal penalty for exceeding the 25 percent expense limitation, Art. 41, § 103D, is not the type of criminal penalty for fraud which the Supreme Court sanctioned in *Schaumburg*. The Secretary argues that the 25 percent expense limitation protects "the citizenry of Maryland from sham and fraud." (Brief, p. 18.) However, under the Maryland statute, if one fails to meet the 25 percent limitation in a charitable solicitation and has not obtained a permit from the Secretary waiving the limitation, he is criminally liable regardless of whether he has made fraudulent misrepresentations. The Supreme Court in *Schaumburg*, when it indicated that "less intrusive means" to prevent fraud could be used than a prohibition on solicitation if less than 75 percent went to charitable purposes, stated that "[f]raudulent misrepresentations can be prohibited and penal laws used to punish such conduct directly." 444 U.S. at 637. Obviously the Court was referring to a statute punishing only fraudulent misrepresentations, and not a statute punishing non-fraudulent solicitations if the expenses exceeded a particular percentage.

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The second distinction between *Schaumburg* and the instant case, which the Secretary argues is constitutionally significant, is that the *Schaumburg* ordinance contained no exception to the 25 percent expense limitation, whereas § 103D(a) directed the Secretary to "issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." Because of this exception in § 103D, the Secretary argues that the Maryland statute is more flexible and "regulates First Amendment freedom of speech in such a way as to minimize encroachment on individual rights." (Brief, p. 18).

The argument that the 25 percent expense limitation in § 103D represents substantially less an intrusion upon First Amendment rights than the *Schaumburg* ordinance, is difficult to accept, considering that the *Schaumburg* ordinance was limited to solicitations from door-to-door and those using the public streets, whereas § 103D embraces all charitable solicitations including telephone solicitations, mail solicitations, speeches at meetings held in private places as well as public, etc.

Moreover, the exemption in the Maryland statute is not an exemption by virtue of the state alone; instead the Secretary of State is directed to issue regulations to provide for such exemption and to issue permits. Permit requirements to engage in protected solicitation, even with guidelines for the issuing administrative officials, were invalidated in several prior cases relied upon by the Supreme Court in *Schaumburg*. *See Largent v. Texas, supra; Cantwell v. Connecticut, supra; Schneider v. State, supra.*

Finally, the authorization for exemption regulations in the Maryland statute is extremely narrow. The Secretary,

in promulgating regulations for permits waiving the 25 percent expense limitation, is confined to "those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions." Art. 41, § 103D. In *Schaumburg*, however, the Court did not limit its concern to organizations which could not raise contributions without exceeding the 25 percent expense limitations. Rather, the Court clearly indicated that charitable organizations making a policy decision to use more than 25 percent of the proceeds raised for purposes other than "charitable," had a constitutional right to do so, that all such organizations could not be lumped with those engaging in fraud, and that the governmental body may implement its legitimate interests in preventing fraud only "by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms." 444 U.S. at 637.

We conclude that the limited provision in § 103D, directing the Secretary to promulgate regulations for waiver permits in those instances where the 25 percent limitation would "effectively prevent the charitable organization from raising contributions," does not save the section under the *Schaumburg* opinion.*

* Both the Court of Special Appeals and the circuit court, in upholding § 103D, relied on the pre-*Schaumburg* decision of the United States Court of Appeals for the Fifth Circuit in National Foundation v. City of Fort Worth, 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040, 90 S. Ct. 688, 24 L. Ed. 2d 684 (1970). In that case, the Fifth Circuit upheld an ordinance which contained a presumption that solicitation expenses exceeding 20 percent of the amount raised were "unreasonable," although one could show that under the circumstances expenses higher than 20 percent "were not unreasonable." The statute also contained many other exemptions from the regulations of charitable solicitations, and thus from the expense limitation. The Supreme Court in *Schaumburg*, without indicating approval or disapproval of the Fifth Circuit's decision, noted that it was distinguishable. 444 U.S. at 635-636. We need not in this case decide whether *National Foundation* can be squared with the principles set forth in *Schaumburg*, because the ordinance involved in *National Foundation* was quite different than

Upon remand, the circuit court should enter a judgment declaring that Art. 41, § 103D(a) and (b), is invalid under the First Amendment to the United States Constitution. The court should also enjoin the enforcement of subsections (a) and (b) of § 103D.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AND REMAND THE CASE FOR ENTRY OF A JUDGMENT CONSISTENT WITH THIS OPINION. RESPONDENT TO PAY COSTS.

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§ 103D. In that case, the ordinance itself contained much broader exemptions from the expense limitation. *See also* Fernandes v. Limmer, 663 F.2d 619, 630-632 (5th Cir. 1981) (applying *Schaumburg* to invalidate a statute imposing an expense limitation on charitable solicitations, and distinguishing *National Foundation* because of the exemptions in the ordinance involved in that case).

APPENDIX

OPINION

(Filed March 11, 1981)

In The Court of Special Appeals of Maryland

No. 925

September Term, 1980

Joseph H. Munson Company, Inc.,

v.

Secretary of State for the State of Maryland

Gilbert, C.J., Morton, Moore, J.J.

Opinion by Gilbert, C.J.

Sometimes a government, in its zeal to protect the governed, enacts laws that trespass unnecessarily upon the constitutional rights of some of the governed. It is extremely difficult in regulating any practice, custom, business, or industry not to trample, to a degree, upon the constitutional rights of someone. Governmental intrusion upon the constitutional rights of one group for the

protection of a larger group, while looked upon with disfavor, is not, however, *ipso facto* invalid. The test is not whether there has been an infringement upon the rights of those regulated, but rather, whether the regulation unnecessarily encroaches on the rights of the regulated.

In this appeal, we must examine a State statute in order to determine whether it is unconstitutional.

The Preamble to Laws 1976, ch. 679[1] provides in part:

> "The Governor on August 16, 1974, created a Commission on Charitable Organizations to examine the existing statutes and to make recommendations. The Commission concluded its work and found that the present laws[2] were inadequate and recommended the original bills (S.B. 287, H.B. 487) in their unamended form. These bills as introduced by the Administration were nearly identical to the 'Model for State Legislation Regulating Charitable Organizations' and endorsed by the numerous National Voluntary Health Agencies."

The Preamble also stated that bills had been "introduced in the 1975 Session as a result of impetus coming" from publications in which it was alleged that "various organizations soliciting funds from the public had excessively high administrative and other expenses, which resulted in a relatively small portion of the contributions . . . being used for their intended purpose."

Obviously, chapter 679 was enacted with the intent of protecting the public by assuring that the organization that solicited the funds was regulated as to the amount of monies that went toward "expenses in connection with . . . [the] fund-raising activity." Section 3 of that chapter created what is now also known as Md. Ann. Code art. 41, § 103D. That section provides:

> "(a) A charitable organization other than a charitable salvage organization may not pay or agree to pay

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[1] Introduced in the General Assembly as House Bill No. 777.

[2] Md. Ann. Code art. 41, §§ 103A-103E (1971 Repl. Vol.).

as expenses in connection with any fund-raising activity a total amount in excess of 25 percent of the total gross income raised or received by reason of the fund-raising activity. The Secretary of State shall, by rule or regulation in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations' provide for the reporting of actual cost, and of allocation of expenses, of a charitable organization into those which are in connection with a fund-raising activity and those which are not. The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund-raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions.

The 25% limitation in this subsection shall not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity.

(b) For purposes of this section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-raising costs; (2) the actual postage paid to the United States Postal Service and printing expense in connection with the soliciting of contributions, nor should these costs be included as fund-raising costs.

(c) Every contract or agreement between a professional fund-raiser counsel or a professional solicitor and a charitable organization shall be in writing, and a copy of it shall be filed with the Secretary of State

within ten days after it is entered into and prior to any solicitations."

Joseph H. Munson Company, Inc., an Indiana corporation (Munson), and a "promotion business," was desirous of entering into a contract with the Fraternal Order of Police, Montgomery County Chapter (F.O.P.). Munson was to raise funds for F.O.P., an organization, described in the stipulation of facts, which was engaged in the dissemination of information and the promotion of causes on behalf of police officers. Because of the fee limitations prescribed in the statute referred to above, no contractual relationship developed between Munson and F.O.P.

Apparently believing itself unlawfully barred *from doing business in Maryland* because of section 103D, Munson filed, in the Circuit Court for Anne Arundel County, a bill of complaint in which it sought a declaratory decree that would hold section 103D unconstitutional. The Secretary of State for the State of Maryland (Secretary) was named as defendant. The court was asked to enjoin permanently the enforcement of the registration provisions and the civil or criminal sanctions permitted by that statute.[3]

[3] The Secretary of State is charged with investigating any alleged violations of the Charitable Organizations Subtitle of Article 41, §§ 103A-103L. Upon finding a violation, subsection 103L(b) confers upon the Secretary several enforcement alternatives, namely:

"(1) Cancel and annul the registration of the violator;
(2) Refer the matter to the Attorney General for civil enforcement . . . ; and
(3) Refer the matter to the appropriate State's attorney for prosecution."

Additionally, section 103L(a) declares the criminal penalties for violating the Charitable Organizations Act to be:

"A charitable organization, professional fundraiser counsel, or professional solicitor which wilfully fails or file a registration statement, report, or other information with the Secretary of State or wilfully files such a statement, report, or other information which is materially false, or otherwise wilfully violates the requirements of this subtitle, is guilty of a misdemeanor, and, upon conviction,

The case was heard in the circuit court by Judge Eugene N. Lerner on a stipulation of facts. The judge held that Munson was not entitled to declaratory relief "since . . . [Munson] has not exhausted its administrative remedies." Furthermore, the trial judge stated that there was no improper delegation of authority to the Secretary of State, and that the statute is constitutional.

On appeal to this Court, Munson poses three questions which we believe may be stated fairly in but one,[4] scilicet:

Is Md. Ann. Code art. 41, § 103D unconstitutional on the basis that it infringes on the First Amendment right of

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shall be fined not more than $5,000 or sentenced to imprisonment for not more than one year, or be both fined and imprisoned."

[4] The three questions raised by Munson were:

"1. Should not the decision below be reversed for reason that Article 41, Section 103D of the Annotated Code of Maryland is unconstitutional and in violation of the Appellant's rights under the First and Fourteenth Amendments of the United States Constitution in light of the facts that the said statute is overbroad in its regulation of protected speech activities, in that it bears an insignificant relation to asserted State interests, fails to unilize the least drastic means available to serve such interests and fails to provide any Constitutionally sufficient exception to the 25% expense limitation?

2. Did not the lower court err in holding that the proper construction of the exception in Section 103D is sufficiently broad to include a 'flexible' percentage scheme and the statute is therefore Constitutional, in light of the facts that the plain language and obvious intent of the exception power is insufficient to create such a flexible scheme; and further, even if such a flexible scheme is included, such a scheme is no less intrusive on First Amendment interests than is a fixed percentage scheme?

3. Did not the lower court err in holding that the proper construction of the exception in Section 103D is sufficiently broad to protect First Amendment interests, in light of the fact that under such a broad construction, the discretion vested in enforcement officials as a result of the lack of standards is itself an unconstitutional infringement on First Amendment interests?"

freedom of speech, and is it an impermissible delegation of legislative authority to the Secretary?

PRELIMINARY ISSUE OF STANDING

Before we undertake to discuss the constitutionality *vel non* of section 103D, we must first consider the Secretary's contention that Munson lacks standing to challenge the statute and, therefore, is not a proper party to have brought the suit in the first instance.

Our review of the record discloses that in response to the original bill of complaint the Secretary, in a motion to dismiss, averred *inter alia* that Munson was not an "interested . . . [party] asserting adverse claims. . . ." The motion was heard by Judge H. Chester Goudy, Jr., who granted the dismissal in part and denied it in part. Significantly, he did not rule upon Munson's standing as an "interested party."

Subsequently, Munson filed an amended bill. The Secretary answered it without posing any question as to Munson's being an "interested party." Nevertheless, the Secretary did raise the question minimally in a Memorandum of Law that it submitted to Judge Lerner. We characterize the standing issue as minimally posited because in eleven pages of typing the only reference to standing is the single sentence, "The . . . [Secretary] seriously questions . . . [Munson's] standing to seek a declaratory judgment."

Apparently the Assistant Attorney General, representing the Secretary, had misgivings about the inattention given to standing in his Memorandum of Law because approximately two weeks later he submitted to Judge Lerner a "Supplemental Memorandum of Law." In the supplement, he dispelled any doubt as to the Secretary's position with respect to Munson's standing inasmuch as the entire supplemental memorandum is devoted exclusively to that question.

Judge Lerner, in his "Memorandum Opinion and Order," did not, however, address the issue of standing but denied relief strictly on the questions of constitutionality.

Md. Rule 1085 provides in part that "[t]his Court will not ordinarily decide any point or question which does not plainly appear . . . to have been tried and decided by the lower court. . . ."

We decline to consider the issue of standing because it was not decided by Judge Lerner inasmuch as he made his decision on other grounds. Md. Rule 1985. *But see, Village of Schaumber v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S. Ct. 826, 834-35, 63 L. Ed. 2d 73 (1980); *Dombrowski v. Pfister*, 380 U.S. 479, 486, 85 S. Ct. 1116, 1121, 14 L. Ed. 2d 22 (1964); *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960); *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S. Ct. 736, 742, 84 L. Ed. 2d 1093 (1939).

CONSTITUTIONALITY *VEL NON* OF
MD. ANN. CODE ART. 41, § 103D

The Supreme Court has held that the regulation of charitable solicitation is a function of the State's police power and a fulfillment of its duty to protect its citizens from fraudulent charitable organizations. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976). The Court has also recognized that First Amendment freedoms are intertwined with any type of solicitation and should be protected. *See Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (commercial solicitation); *Hynes v. Mayor of Oradell, supra* (charitable and political solicitation); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 2d 1213 (1940) (religious solicitation). At first blush it would seem that *Hynes* is in conflict with the free speech solicitation right. The conflict, however, may be reconciled by the State's imposing reasonable regulations on charitable solicitations.

Recently, in *Village of Schaumberg v. Citizens for a Better Environment, supra*, the Court, speaking through Justice White, addressed the balancing of police power *vis-a-vis* solicitations. The Village ordinance prevented a charitable organization from obtaining a solicitation permit unless "'[s]atisfactory proof that at least seventy-five percent of the proceeds of such solicitations . . . [would] be used directly for the charitable purpose of the organization.'" (Footnote omitted.) 444 U.S. at 624, 100 S. Ct. at 829. Citizens for a Better Environment (Citizens), an organization that promoted the protection of the environment, was denied a permit by the Village inasmuch as Citizens "could not demonstrate that 75 percent of its receipts would be used for 'charitable purposes'. . . ." *Id.* at 625, 100 S. Ct. at 830. Citizens' excessive expenditures were attributed to its employment of door-to-door "canvassers" who, in addition to collecting contributions, distributed "'literature on environmental topics and answer[ed] questions of an environmental nature when posed'" and accepted complaints about the state of the environment. *Id.* As a result of the Village's refusal to grant a permit to Citizens, it challenged the ordinance on the ground that it violated its First and Fourteenth Amendment rights to freedom of speech.

The Court held that particular ordinance to be an unconstitutional infringement on freedom of speech. Chaitable solicitations are a form of speech entitled to First Amendment protection, the majority said.[5] To pass constitutional muster, any State regulation of charitable soliciation must "serve a sufficiently strong, subordinating interest . . . that the . . . [State] is entitled to protect." *Id.* at 636, 100 S. Ct. at 836. Consequently, the regulation must be drawn in such a narrow manner as to serve the State's interest "without unnecessarily interfering with First Amendment freedoms." *Id.* at 637, 100 S. Ct. at 836. *See Consolidated Edison Co. v. ublic Service Commission*, ___ U.S. ___, 100 S. Ct. 2326, ___ L. Ed. 2d ___ (1980).

[5] Justice Renquist dissented. 444 U.S. at 639-45, 100 S. Ct. at 837-40.

Earlier, in *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340, 9 L. Ed. 2d 405 (1963), the Court had opined that "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone. . . ." (Citations omitted.)

Although the Court believed the Village's interest in protecting its citizens from "fraud, crime and undue annoyance," was substantial, the inflexible 25% solicitation limitation was not narrowly drawn and interfered "unnecessarily" with the freedom of speech. The Court rejected Village's rationale that "any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent." 444 U.S. at 636, 100 S. Ct. at 836. The Supreme Court agreed with the United States Court of Appeals (7th Cir.) that "this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these function *as well as solicit financial support*." (Emphasis supplied.). *Id.* Such organizations may need to spend more than 25% of the solicitation on non-charitable purposes. Village's ordinance failed to take into consideration the research, advocacy or public education type of organizations and summarily prevented them from soliciting funds for their charitable purpose.

The Court noted that "Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation." *Id.* at 637, 100 S. Ct. at 836. Among other things, Village may prohibit "fraudulent misrepresentations" and enact penal laws to punish violations.

The flaw in the ordinance that Village enacted was the ban on solicitation by any charitable organization that expended more than 25% of its funds for charitable purposes. The prior restraint imposed on all charitable

organizations without exception was an unnecessary intrusion on the freedom of speech. The ordinance either ignored or arbitrarily classified all charitable organizations as one and the same. By so doing, they failed to recognize that the research, advocacy, or educational organization fits a different mold. Moreover, the ordinance also failed to acknowledge that there might be a valid reason why more than 25% of the proceeds was needed at a given time for other than strictly charitable purposes. Even if a charitable solicitor could show clearly that a sum greater than 25% was necessary to its particular needs, the demonstration would have been to no avail because the ordinance permitted no flexibility.

Statutes or ordinances regulating the solicitation of funds by charitable organizations have, however, been judicially sanctioned. *See e.g., National Foundation v. City of Fort Worth*, 415 F.2d 41 (CA5 1969), *cert. denied*, 396 U.S. 1040 (1970). We must then look to the holdings of such cases in order to find the reason or reasons why those ordinances or statutes were free of constitutional defect.

The *National Foundation v. Fort Worth* ordinance required each charitable organization to obtain a license before solicitation of funds. The license would be denied if it was determined that an applicant was expending or was expected to spend for solicitation costs more than 20% of the gross amount raised. The 20% limitation was not, however, an inflexible barrier. An applicant with an expenditure or expected expenditure of more than the specified 20% could, nevertheless, obtain a license if it demonstrated special facts or circumstances that reasonably justified such an expenditure. The Fifth Circuit Court of Appeals said that the pliant feature in the 20% limitation buttressed the ordinance's constitutionality by recognizing that a fixed percentage "might be undesirable and inapplicable if applied to all types of charitable organizations." *Id.* at 46. Furthermore, the suppleness of

the limitation made it "a valid and constitutional means of achieving the city's purpose of protecting its citizens."*

Another case in which a charitable solicitation regulation ordinance was held to be constitutionally valid is *Holloway v. Brown*, 62 Ohio St. 2d 65, 403 N.E. 2d 191 (1980). There, a solicitation permit would not be issued if the cost of solicitation was more than 15% of the gross total raised through the solicitation. Excessive expenditures were, however, only *prima facie* evidence of unreasonableness, and the permit would be issued if the applicant could show that spending more than 15% of the gross solicitation was reasonable. The court concluded that the ordinance was sufficiently narrow to comply with *Schaumburg's* standards. Manifestly, the saving feature of the ordinance was the elasticity allowed in the percentage limitation. The limitation, coupled with the authority to increase it for good cause, enabled the local government to "screen out only those solicitations which indeed pos[ed] a substantial risk of invoking fraud or misrepresentation." *Id.* at 73-74, 191 N.E.2d at 197.

A similar regulation was addressed in *National Black United Fund, Inc. v. Campbell*, 494 F. Supp. 748 (D.C.D.C. 1980), wherein a federal program allowed charitable organizations "the luxury" of soliciting federal employees while the employees were at work. In order to be eligible for participation in the program, an organization had to meet certain requirements, one of which was a fixed percentage limitation on the cost of administrative expenses. If those expenses exceeded 25% of the organiza-

* It is interesting to note that the *Schaumburg* Court distinguished the Fort Worth ordinance from the Schaumburg ordinance and impliedly endorsed the 20% flexible limitation as a constitutional means of regulating charitable solicitation. 444 U.S. at 635, n. 9, 100 S. Ct. at 835. Unlike the Fort Worth ordinance, the regulation in *Schaumburg* failed to provide means whereby an organization, which legitimately needed to expend more that 25% on non-charitable costs, could show that the excessive cost was reasonable.

tion's annual income, the organization had to demonstrate that the excess expenditures were reasonable.

The district court stuck down the regulation on the basis that it was unconstitutionally applied. The court, however, concluded that the regulation was valid on its face. In so doing, the court recognized that the "flexible percentage limitation" distingusihed the valid federal regulation from that of the Schaumburg ordinance.

With the holdings of *Schaumburg*, *National Foundation*, *Holloway* and *National Black United Fund*, *supra*, firmly in mind, we shall begin our analysis of the above-quoted § 103D of Article 41.

We observe that the Maryland statute is similar to those found in *National Fund*, *Holloway* and *National Black United Fund*. In all three of those cases, the laws limiting solicitations were held to permit enough flexibility to survive an attack built upon First Amendment freedom of speech. While it is true that section 103D proscribes the expenditure for non-charitable purposes of more than 25% of the gross total income raised through a fund-raising activity, any charity may be exempted from the strictures of that prohibition if the charity demonstrates that "the 25% limitation would effectively prevent . . . [it] from raising contributions." An organization which legitimately needs to expend more than 25% of its total gross income for administrative costs is not summarily characterized as "fraudulent" and, thereby, subjected to prosecution, as were the charitable organizations in *Schaumburg*, *supra*.

Additionally, the spending limitation of section 103D does not place a prior restraint on the First Amendment freedom of speech associated with charitable solicitation. As we see it, section 103D regulates charitable solicitation through the means suggested by the *Schaumburg* court, namely, penal laws and financial disclosure requirements. While registration is mandated in order for a charitable organization to solicit contributions, Md. Ann. Code art. 41, § 103B, the organization is not denied registration, *ipso*

facto, if it expends more than 25% of its funds for non-charitable purposes. Irrespective of the amount spent or to be spent on solicitation, a license is issued upon completion of the registration. Should a registered charity then decide to expend more than the sanctioned 25% on non-charitable costs, without being exempted by the Secretary, it violates section 103D and is, thereby, exposed to the criminal penalties spelled out in section 103L. The threat of criminal prosecution, not prior restraint, deters fraudulent activity.

The registration statements, dictated by Md. Ann. Code art. 41, § 103B, contain an "income and expense statement, and a financial report (including the kind and amount of its gross income raised, costs and expenses incidental to the fund-raising activities . . .). . . ." Pursuant to Md. Ann. Code art. 41, § 103G, the statement becomes a public record and, of course, is open to public scrutiny. Furthermore, the actual contracts between a charity and a professional solicitor are also filed as public records, *Id.*, after having been filed with the Secretary. Md. Ann. Code art. 41, § 103D(c).

We think section 103D regulates First Amendment freedom of speech in such a way as to minimize encroachment upon individual rights while simultaneously protecting the citizenry of this State from sham and fraud. In sum, section 103D is drawn in a manner calculated to protect the public interest "without unnecessarily interfering with First Amendment freedoms." The statute is constitutional.

The Delegation of Legislative Authority

Munson's lawyers, as careful tacticians, did not "put all their eggs in one basket." They had a fall-back position. In the instant case, it took the form of an assault upon what Munson avers to be an unconstitutional delegation of legislative authority to the Secretary.

Munson asserts that section 103D vests too much discretion in the Secretary in that there are insufficient standards because reasonable guidelines are not present. We have an entirely different view.

Rarely has a statute been held unconstitutional because of an impermissible delegation of legislative power.[7] The rule used in measuring whether the Legislature has properly delegated authority is:

> The Legislature has the power to grant to an administrative agency the discretion to implement statutory provisions, through rules and regulations, provided that the agency is furnished reasonable guidelines or standards to follow in fulfilling the legislative command.

Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977); *Gino's of Maryland, Inc. v. City of Baltimore*, 250 Md. 621, 244 A.2d 218 (1968); *Mason v. State*, 12 Md. App. 655, 280 A.2d 753 (1971).

As we see it the Legislature has delineated clearly the guidelines to be followed by the Secretary in implementing the charitable organization's 25% "overhead" limitation whenever funds are solicited from the public. The guidelines are:

> 1) Section 103D (a) instructs the Secretary to use the "standard of accounting and fiscal reporting for voluntary health and welfare organizations" when allocating costs of an organization between those expended in connection with a fund-raising activity and those which are not.
>
> 2) Section 103D (b) sets out the expenditures which are not to be included in the total gross income when computing the 25% limitation, nor are they to be considered as fund-raising costs. The exclusions are the costs of "goods, food, entertainment, or drink sold or provided to the public" and "the actual postage

[7] Davis, 1 *Administrative Law Treatise* §§ 2.01-.16 (1958).

paid . . . and printing expense in connection with the soliciting of contributions."

3) After the authorized deductions are made from the total gross income generated by the fund-raising solicitation, the 25% limitation on non-charitable expenses is computed.

4) If the expenditure for non-charitable purposes exceeds 25% of the total gross, less allowable deductions, a charity can avoid violating section 103D if the Secretary of State determines that "the 25% limitation would effectively prevent the charitable organization from raising contributions."

The Secretary, in accordance with the legislative directive relative to the adoption of rules and regulations, has promulgated regulations that provide a mechanism through which a charitable organization can demonstrate to the Secretary that the 25% limitation would amount to prohibition of the charity's fund-raising activity. *See* COMAR .01.02.04.05-.13.

We hold that Md. Ann. Code art. 41, § 103D is not constitutionally ailing. The Legislature did not impermissibly delegate authority to the Secretary. Judge Lerner did not err in upholding the validity of the statute.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

APPENDIX

OPINION AND ORDER

(Filed July 2, 1980)

In The Circuit Court for Anne Arundel County

Equity No. 24,949

Joseph H. Munson Co., Inc., an Indiana Corporation

Plaintiff

v.

Fred L. Wineland, Secretary of State for the State of Maryland

Defendant

MEMORANDUM OF OPINION AND ORDER

This matter came on for hearing on June 16, 1980, on Plaintiff's Bill of Complaint seeking a Declaratory Judgment and Injunctive Relief. Counsel were heard in open Court and the pleadings together with memoranda filed in these proceedings have been read and considered herein by the Court.

The parties to this action have stipulated to the following facts:

1. That the Charitable Solicitation Laws contained in Article 41, Section 103, *et seq.*, of the *Annotated Code of Maryland* (1978, 1979 Cum. Supp.) which limits the amount that can be allocated for fund raising expenses are generally enforced in the State of Maryland.

2. That the Fraternal Order of Police, Montgomery County Chapter, (hereinafter referred to as FOP) is reluctant to enter into a contract with the Plaintiff, Joseph H. Munson Co., Inc., (hereinafter referred to as Plaintiff) for promotion of fund raising events due to the limitation imposed by Article 41, Section 103, *et seq.*, *supra.*, that nothing in excess of 25% of the gross income raised through fund raising activities may be expended on fund raising expenses.

3. That the Plaintiff's contract with the FOP calls for a fee in excess of 25% of the net income raised through fund raising activities.

4. That the FOP is engaged in the dissemination of information and the advocacy of causes on behalf of police officers.

5. That except for the contractual relationship regarding promotion of fund raising activities, as indicated above in Number 3, there exists no other financial relationship between the Plaintiff and the FOP.

This Court by an Order dated May 25, 1978 dismissed Counts I and II of the Plaintiff's Bill of Complaint seeking a Declaratory Judgment that the Plaintiff is not in violation of Article 41, Section 103, *et seq.*, *supra*, and an injunction to prevent the Defendant from finding that the Plaintiff is in violation of this Statute. The dismissal of Counts I and II were based on this Court's finding that a special form of remedy regarding the issues raised in the said Counts have been provided for by statute and that, therefore, the Plaintiff is not entitled to judicial relief absent an exhaustion of administrative remedies. The

Plaintiff filed an Amended Bill of Complaint realleging Counts I and II. The purpose presumably being that it wished to include same in the amended pleading to reserve for reconsideration by the Court and or for a possible appeal. This Court again dismisses Counts I and II for the same reasons. Remaining for determination are the issues raised by Counts III, IV and V of the Plaintiff's Amended Bill of Complaint. These issues will be treated in turn.

The Plaintiff in Counts III and IV alleges that among the provisions of Article 41, Section 103, *et seq.*, *supra.*, those contained in Section 103D(a) which state in part that "the Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions" represents a constitutionally impermissible delegation of legislative authority since the said provisions contain no guidelines or inadequate guidelines for the Secretary of State to implement such rules and regulations. For this reason the Plaintiff requests that Section 103D(a) be declared unconstitutional and that the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, (hereinafter referred to as the Defendant), be enjoined *pendente lite* and permanently from enforcing the terms in Article 41, Section 103D.

This Court herein finds that the Plaintiff's contention that Section 103D creates a constitutionally impermissible delegation of legislative authority is without any real merit. This Court recognizes the well established principle that, generally, a statute or ordinance vesting an administrative official with discretion to make rules or regulations without fixing any standards for guidance is an unconstitutional delegation of legislative power. *Pressman v. Barnes*, 209 Md. 544 (1956). However, the application of this principle is not without qualification. A review of recent decisions reveals that the prevailing view is

"toward a greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of laws as the complexity of governmental and economic conditions increases." *Pressman v. Barnes, supra*, at 555; *Mason v. State*, 12 Md. App. 655 (1971). In *Governor of Maryland v. Exxon Corp.*, 279 Md. 410 (1976), the Court considered the question of unlawful delegation of legislative authority with regard to a grant of authority to the Comptroller enabling him to adopt regulations and administer exceptions from the Retail Gasoline Service Station Divestiture Statute. The Court upheld the grant of authority as proper and found that, although sufficient standards and guidelines ordinarily must be fixed when delegating legislative authority to an administrative official, it is well recognized "that the complexity of modern economic conditions makes it impossible to tailor specific guidelines for every conceivable situation and that latitude in granting discretion is necessary." *Governor of Maryland v. Exxon Corp., supra*, at 440.

This Court finds that a perusal of Article 41, Section 103D, *supra*, in its entirety shows that the power delegated to the Secretary of State to administer exceptions to the 25% expenditure limitation on charitable organizations clearly does not represent an unconstitutional delegation of legislative authority. The statute contains provisions permitting the Secretary of State to establish an exception from the 25% expenditure limitation for fund raising activities where the said limitation would effectively prevent the charitable organization from raising contributions. In permitting an exception the Secretary of State is directed to promulgate "rules and regulations in accordance with the 'standard of accounting and fiscal reporting for voluntary health and welfare organizations.'" Further, the statute provides that the 25% limitation does not apply to compensation or expenses paid to a professional fund raiser counsel for conducting feasibility studies and that the total gross income subject to the 25% limitation excludes funds raised which equal

the cost of food, drink, entertainment and goods sold or provided to the public and the actual amount expended on postage or printing expenses in connection with soliciting contributions.[1] This Court herein finds that the above mentioned provisions serve as adequate guidelines for the purpose of a constitutional delegation of legislative authority. In light of the above authorities, specifically tailored standards or guidelines outlining all or a majority of situations in which to apply the 25% limitation exception is not constitutionally required by the legislature in delegating its power. The provisions of Section 103D set forth reasonable guidelines for the Secretary of State in administering the exception without clogging up the works in the proper administration of Article 41, Section 103, *et seq.*, *supra*, in its entirety. Accordingly, this Court finds that the delegation of powers under Section 103D(a) falls within constitutional boundaries.

This Court next considers the Plaintiff's contention contained in Count V that Article 41, Section 103, *et seq.*, *supra*, which prohibits charitable organizations from paying or agreeing to pay as expenses in connection with fund raising activities a total amount in excess of 25% of the total gross income raised or received as a result of fund raising activities, is unconstitutional in violation of the right of free speech and assembly afforded by the First and Fourteenth Amendments. In support of this contention the Plaintiff relies primarily upon the decision handed down in *Village of Schaumburg v. Citizens for Better Environment*, ___ U.S. ___, S. Ct. 826 (1980), in which the Supreme Court considered the validity under the First and Fourteenth Amendments of municipal ordinance prohibiting door-to-door or on-street solicitation of contributions

[1] This Court notes that additional administrative regulations are pursuant to Article 41, Section 103, *et seq.*, *supra*, are contained in COMAR 01.02.03.01 *et seq.*, which enable an interested party to file a petition for adoption of regulations, declaratory rulings or a request for a hearing where an application for either registration or for a waiver of the 25% limitation has been rejected.

by charitable organizations that do not use at least 75% of their receipts for "charitable purposes."

The Supreme Court in that case first recognized that charitable appeals for funds involve a variety of speech interests such as communication of information and dissemination of views and ideas which are within the ambit of the First Amendment right to freedom of speech. The Supreme Court then considered the ordinance at issue in light of the right to freedom of speech. The ordinance in the *Shaumburg* decision prohibited solicitation of charitable contributions on the public streets without first applying for a permit and, further, that in order to obtain a permit the applicant must provide satisfactory proof that at least 75% of the funds raised will be used directly for a charitable purpose. The Supreme Court held that the absolute 75% limitation of the ordinance from which no exceptions were made resulted in an unconstitutionally overbroad ordinance in violation of the First and Fourteenth Amendments. The Court reasoned that regulation of charitable solicitation, though properly subject to reasonable regulation, must be carried out in a manner so as not to unnecessarily intrude upon the rights to freedom of speech.

In *Schaumburg*, the Supreme Court found that the ordinance's 75% requirement was unreasonable on its face since it effectively prohibited solicitation by a substantial category of charitable organizations to which the 75% limitation could not be applied consistently with the First and Fourteenth Amendments. Such organizations being those that are primarily engaged in research, advocacy or public education and that use their own paid staff to carry out these functions as well as to solicit financial support. The Supreme Court was unable to perceive any substantial relationship between the 75% limitation and the protection of the public from fraud or residential privacy since there was no indication that charitable organizations expending more than 25% of their funds to salaries and other expenses are more likely to employ solicitors who

would threaten the public safety than other charitable organizations. Accordingly, the *Schaumburg* ordinance impermissibly and unnecessarily infringed upon First Amendment rights because it failed to provide any discretion in the hands of the administrative officials to provide for exceptions to the 75% limitation and had the effect of a prior restraint on First Amendment rights.

In the present action the Plaintiff asserts that Article 41, Section 103, *et seq.*, *supra*, is analogous to the *Schaumburg* ordinance. The Plaintiff contends that the 25% limitation for fund raising expenses in conjunction with the exception provided by Section 103D(a) represents an unconstitutionally overbroad statutory requirement and results in a prior restraint on First Amendment rights. At oral argument, Counsel for the Plaintiff asserted that the exception under Section 103D(a) was a very narrow one allowing for an exception in only one instance and that, therefore, the exception does not provide an adequate "escape hatch" from the limitations of the statute which would enable the statute to pass constitutional muster. As a result, the Plaintiff argues that the ordinance in question is constitutionally invalid since it represents a form of regulation which unnecessarily intrudes upon the right to freedom of speech in a manner inconsistent with the First and Fourteenth Amendments.

This Court herein finds that the Plaintiff's challenge as to the validity of the ordinance in question on the basis of First and Fourteenth Amendment rights does not hold any real weight.

First, this Court finds that the *Schaumburg* decision is distinguishable from the present case. In *Schaumburg*, the ordinance in question required that a permit be obtained before a charitable organization began solicition for funds and that in order to qualify for a permit the charitable organization must satisfactorily demonstrate that 75% of the proceeds were used for charitable purposes. No

exception at all was provided from the 75% limitation. In essence, either the charitable organization qualified or it did not. The result of the ordinance was an inflexible standard which significantly infringed upon the rights of a class of charitable organizations which maintained paid employees and used less than 75% of its proceeds for charitable purposes. In the present case, the charitable organizations are not required to obtain or qualify for a permit to solicit funds by first showing that they meet the 25% limitation contained in the statute. Additionally, the statute in question provides an exception to accommodate those charitable organizations "where the 25% limitation would effectively prevent the charitable organization from raising contributions." The statute further delineates certain adjustment to the 25% limitation so as not to include some of the expenses related to solicitation such as postage, printing and the actual costs of the food, drink and entertainment provided to the public for solicitation purposes. Under the terms of the statute then, charitable organizations are not subjected to a prior restraint of their solicitation rights in violation of the First and Fourteenth Amendments since they need not obtain a permit at the outset.

Second, this Court herein finds that the exception provided under Section 103D of the statute is not drawn so narrowly as to provide an inadequate "escape hatch" in violation of the constitution. The exception explicitly empowers the Secretary of State to "permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in *those instances* where the 25% limitation would effectively prevent the charitable organization from raising contributions. This Court interprets the above language as providing for a sufficiently broad exception allowing the statute to withstand a constitutional challenge. Under Section 103D the Secretary of State is provided with a reasonable amount of flexibility in exercising his discretion to permit a charitable organization to make expenditures in excess of the 25% limitation.

For the above reasons, this Court finds that the *Schaumburg* decision is not analogous to the present case and, therefore, its reasoning does not apply across the board to the facts of this case in order to appropriately find the statute in question unconstitutional. Rather, this Court finds that the present case is analogous to the decision presented in *National Foundation v. Fort Worth*, 415 F.2d 41 (5th Cir. 1969) *cert. denied*, 396 U.S. 1040 (1970). In that case the United States Court of Appeals considered an ordinance which contained a 20% limitation similar to the 25% limitation in the statute presently before this Court. However, the *Fort Worth* ordinance also contained a provision permitting a charitable organization to obtain a permit for solicitation by demonstrating that the costs in excess of 20% of the amount collected is reasonable under the special facts or circumstances concerning the charitable organization. The Court of Appeals upheld the *Fort Worth* ordinance as constitutional and found that the provisions of the ordinance contained reasonable standards for the regulation of charitable organizations consistent with constitutional rights. This case was cited with approval in the *Schaumburg* decision. This Court fails to see, as the Plaintiff contends, where the exception contained in the *Fort Worth* ordinance is singificantly broader than the exception contained in the statute in question. This Court finds that the words "in those instances where the 25% limitation would effectively prevent a charitable organization from raising contributions" provide a sufficiently flexible standard which impliedly takes into consideration the special circumstances of a charitable organization which may be entitled to be exempt from the 25% limitation.

For the above reasons, this Court finds that Article 41, Section 103, *et seq.*, *supra*, is valid as a constitutional means of regulating the solicitation activities of charitable organizations without impermissibly infringing upon their rights under the First and Fourteenth Amendments.

WHEREFORE, it is this 2nd day of July, 1980, by the Circuit Court for Anne Arundel County, ORDERED

That this Court, sitting as a Court of Equity, hereby declares:

1. That the Plaintiff is not entitled to a Declaratory Judgment under Count I to the effect that Plaintiff is not violating nor has violated the registration or fund raising limitations of Article 41, Section 103A, *et seq.*, *supra*, since it has not exhausted its administrative remedies.

2. That the Plaintiff is not entitled to a Declaratory Judgment under Count II to enjoin the Defendant from finding that the Plaintiff is subject to the registration provisions of Article 41, Section 103A, *et seq.*, *supra*, since it has not exhausted its administrative remedies.

3. That Article 41, Section 103D, *supra*, is not unconstitutional as alleged in Counts III and IV since the provisions of the said statute do not constitute an improper and unconstitutional delegation of legislative authority for the reasons stated in the instant Memorandum of Opinion and Order.

4. That Article 41, Section 103, *et seq.*, *supra*, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of 25% of the total gross income raised by reason of the fund raising activity, is not unconstitutional since regulation of fund raising activities by charitable organizations imposed under the said statute is reasonable and is not violative of the First and Fourteenth Amendments for the reasons stated in the instant Memorandum of Opinion and Order.

It is, therefore, ORDERED, ADJUDGED and DECREED:

a. That Counts I and II of the Plaintiff's Amended Bill of Complaint, be, and the same are hereby dismissed.

b. That judgment be entered in favor of the Defendant and against the Plaintiffs with respect to Counts III, IV and V.

It is further, ORDERED, that the Plaintiff pay the costs of these proceedings.

EUGENE M. LERNER,
Judge.